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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 John Vincent Fitzgerald,  
10 Petitioner,  
11 v.  
12 Ryan Thornell, et al.,  
13 Respondents.  
14

No. CV-19-05219-PHX-MTL

**ORDER**

**DEATH-PENALTY CASE**

15 Before the Court is Petitioner John Vincent Fitzgerald’s combined motion to stay  
16 and hold this case in abeyance until he exhausts certain habeas claims in state court (Doc.  
17 60 at 1–19) and for authorization to have his habeas counsel represent him in state court  
18 (*id.* at 1, 19–22). Respondents oppose the former and take no position on the latter. (Doc.  
19 66 at 1.) For the reasons below, the Court will deny both requests.

20 **I. BACKGROUND**

21 In 1993, the Arizona Legislature eliminated parole for felonies committed after  
22 December 31, 1993. A.R.S. § 41-1604.09(I) (West 1993). In 1994, the United States  
23 Supreme Court held in *Simmons v. South Carolina* that when a capital defendant’s future  
24 dangerousness is at issue and state law bars his release on parole, due process entitles him  
25 to inform the jury—through argument or jury instruction—that he would be ineligible for  
26 parole if not sentenced to death. 512 U.S. 154, 156, 177–78 (1994); *see also Cruz v. Arizona*  
27 (*Cruz II*), 598 U.S. —, 143 S. Ct. 650, 655 (2023).

28 Years after enactment of A.R.S. § 41-1604.09(I) and the decision in *Simmons*, a

1 grand jury indicted Fitzgerald for a 2005 burglary and murder, and the State noticed the  
2 intent to seek a death sentence for the murder. (R.O.A. 4, 25.) A jury found Fitzgerald  
3 guilty as charged. (R.O.A. 469–70.) At the penalty phase for the murder, the court declared  
4 a mistrial. *State v. Fitzgerald*, 303 P.3d 519, 521 (Ariz. 2013). As a result, a new jury had  
5 to be selected for a new penalty phase.

6 In selecting a jury for the new penalty phase, prospective jurors were told in a  
7 questionnaire that if the jury did not sentence Fitzgerald to death, the trial court would  
8 sentence him to life in prison, either with or without “the possibility of *release*.” (R.O.A.  
9 644 at 10, emphasis added.) At voir dire, the court also told the prospective jurors that if  
10 not sentenced to death for the murder, the court would sentence Fitzgerald to life in prison,  
11 either with or without the “possibility of *parole*,” despite Fitzgerald being parole ineligible.  
12 (R.T. 5/24/10 at 13; R.T. 5/25/10 at 12; R.T. 5/26/10 at 7–8, emphasis added.) After  
13 empaneling a new penalty-phase jury, the court, without objection, instructed the jury that  
14 if it spared Fitzgerald’s life, the court would sentence him to life in prison, either with or  
15 without “the possibility of release.” (R.T. 6/2/10 at 39–40, 54–55; R.T. 8/18/10 at 30.) The  
16 court explained that life in prison without the possibility of release meant that he would be  
17 ineligible for release “on any basis,” including parole. (R.T. 6/2/10 at 40.) At no point did  
18 Fitzgerald seek a *Simmons* instruction, or to tell the jury that he was parole ineligible.

19 The jury sentenced Fitzgerald to death. *Fitzgerald*, 303 P.3d at 521, ¶ 3. Fitzgerald  
20 did not raise a *Simmons* claim on direct appeal or on postconviction review (“PCR”). (*See*  
21 Opening Brief; R.O.A. 877.) Nor did he receive relief in either proceeding. (R.O.A. 916.)

22 In 2015, the Arizona Supreme Court held in *State v. Lynch* (*Lynch I*) that a trial  
23 court did not err in refusing to give a *Simmons* instruction, citing A.R.S. § 41-1604.09(I),  
24 because the defendant was eligible for other forms of release, such as clemency. 357 P.3d  
25 119, 138 (Ariz. 2015) (citing A.R.S. § 13-703(A), renumbered as § 13-751(A)). But the  
26 United States Supreme Court reversed *Lynch I*, holding that future clemency, or the  
27 enactment of a statute restoring parole, did not “diminish[ ] a capital defendant’s right to  
28 inform a jury of his parole ineligibility.” *Lynch v. Arizona* (*Lynch II*), 578 U.S. 613, 615

(2016) (citing *Simmons*, 512 U.S. at 166, 177).

In 2019, Fitzgerald commenced this habeas case, and the Court appointed the Arizona Federal Public Defender’s Office to represent him but barred habeas counsel from representing Fitzgerald “in state forums or prepar[ing] any state court pleadings” absent the Court’s “express authorization.” (Doc. 1; Doc. 5 at 1). In July 2020, Fitzgerald filed his initial habeas petition. (Doc. 21.) Meanwhile, in April 2020, the Arizona Supreme Court agreed to review *State v. Cruz* (*Cruz I*), CR 17-0567-PC (Ariz.), to address whether *Lynch II* was a “significant change in the law” under Arizona Rule of Criminal Procedure 32.1(g), so as to bar a successive PCR raising a raising a *Lynch II* claim.<sup>1</sup>

In June 2021, the Arizona Supreme Court held in *Cruz I* that *Lynch II* was not a significant change in the law under Rule 32.1(g). 487 P.3d 991 (Ariz. 2021). In October, 2022, Fitzgerald amended his habeas petition, alleging in Claim 14 that the trial court violated his Fourteenth Amendment due process rights by failing to give a *Simmons* jury instruction. (Doc. 35 at 282–90.) He acknowledged that he did not seek such an instruction or raise a *Simmons* claim in state court. (Doc. 35 at 280, 282.)

In 2023, the Supreme Court reversed the Arizona Supreme Court’s holding in *Cruz I*, that *Lynch II* “was not a significant change in the law for purposes of Rule 32.1(g)” and that *Cruz I* was not based on an adequate and independent state-law ground as to bar Cruz’s filing of a successive PCR petition asserting a *Lynch II* claim. *Cruz v. Arizona* (*Cruz II*), 598 U.S. 17, 143 S. Ct. 650, 655 (2023) (quoting Ariz. R. Crim. P. 32.1(g)).

The Court vacated “the judgments” and remanded “the cases” of other Arizona death row prisoners “to the Superior Court of Arizona, Maricopa County for further consideration in light” of *Cruz II*. *Burns v. Arizona*, 21-847, — U.S. —, 143 S. Ct. 997 (2023) (Mem.).<sup>2</sup> In light of *Cruz II*, Fitzgerald filed his combined motion, which is fully

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<sup>1</sup> Under Rules 32.1(g) and 32.2(b), a defendant may obtain relief on successive PCR if an applicable, “significant change in the law . . . would probably overturn the defendant’s judgment or sentence.” Ariz. R. Crim. P. 32.1(g) and 32.2(b).

<sup>2</sup> Prisoners Johnathan Burns, Steve Boggs, Ruben Garza, Fabio Gomez, Steven Newell, and Stephen Reeves filed a joint petition for a writ of certiorari based on *Cruz II*.

1 briefed. (Docs. 62–63, 66–67.)

## 2 **II. APPLICABLE LAW**

### 3 **A. Rhines Stay**

4 Under *Rhines v. Weber*, the Court may stay a habeas case that contains both  
 5 exhausted and unexhausted claims while the petitioner exhausts his unexhausted claims in  
 6 state court, before returning to the habeas court for review of the fully exhausted petition.  
 7 544 U.S. 269, 271–79 (2005). A *Rhines* stay is proper only if the petitioner shows (1) “good  
 8 cause” for the failure to exhaust, (2) the unexhausted claim is “potentially meritorious,”  
 9 and (3) the petitioner did not “engage[] in intentionally dilatory litigation tactics.” *Id.* at  
 10 277–78. Because a *Rhines* stay applies solely to a petition containing both exhausted and  
 11 unexhausted claims, i.e., a mixed petition, this Court must first decide whether any of the  
 12 claims that Fitzgerald seeks to exhaust are unexhausted. *See King v. Ryan*, 564 F.3d 1133,  
 13 1140 (9th Cir. 2009); *see also, e.g., Bearup v. Shinn*, No. CV-16-03357-PHX-SPL (D.  
 14 Ariz. Jan. 26, 2023) (Doc. 150).

### 15 **B. Exhaustion**

16 A petitioner has not exhausted a habeas claim in state court “if he has the right under  
 17 the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C.  
 18 § 2254(c). A claim is exhausted if (1) it has been fairly presented to the highest state court  
 19 with jurisdiction to consider it or (2) no state remedy remains available to exhaust the claim.  
 20 *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). No state remedy remains available if  
 21 the state’s procedural rules bar a state court from considering the claim, resulting in the  
 22 claim being “technically exhausted.” *See Woodford v. Ngo*, 548 U.S. 81, 92 (2006) (citing  
 23 *Gray v. Netherland*, 518 U.S. 152, 161 (1996)); *Coleman v. Thompson*, 501 U.S. 722, 732  
 24 (1991) (citing 28 U.S.C. § 2254(b); *Engle v. Isaac*, 456 U.S. 107, 125–26 n.28 (1982))  
 25 (claims defaulted in state court); *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007).  
 26 Hence, a *Rhines* stay should not be granted if a petition contains only claims that are  
 27 actually, or technically, exhausted. *See, e.g., Pritchett v. Gentry*, No. 2:17-cv-01694-JAD-  
 28 DJA, 2022 WL 4366996, at \*4 (D. Nev. Sept. 21, 2022) (noting “[t]he point of [the] stay

1 is to allow” presentment of “unexhausted claims” in state court); *White v. Ryan*, No. CV-  
 2 09- 2167-PHX-FJM (LOA), 2010 WL 1416054, at \*12 (D. Ariz. Mar. 16, 2010) (denying  
 3 *Rhines* stay of a petition that has only exhausted or technically exhausted claims).

#### 4 **C. Arizona’s Bar on Successive Postconviction-Relief Claims**

5 Rule 32 of the Arizona Rules of Criminal Procedure governs postconviction review  
 6 for those convicted and sentenced following a trial. Ariz. R. Crim. P. 32.1. As relevant  
 7 here, postconviction relief is available for a constitutional violation under Rule 32.1(a), *id.*  
 8 at 32.1(a); when “newly discovered material facts probably exist” that “probably would  
 9 have changed the judgment or sentence,” *id.* at (e); and when there is “a significant change  
 10 in the law that, if applicable to the defendant’s case, would probably overturn the  
 11 defendant’s judgment or sentence,” *id.* at (g).

12 A constitutional claim under Rule 32.1(a) is precluded if it was “finally adjudicated  
 13 on the merits in an appeal or in any previous post-conviction proceeding,” Ariz. R. Crim.  
 14 P. 32.2(a)(2), or if it was “waived at trial or on appeal, or in any previous post-conviction  
 15 proceeding, except when the claim raises a violation of a constitutional right that can only  
 16 be waived knowingly, voluntarily, and personally by the defendant,” *id.* at (3). A claim  
 17 under Rules 32.1(e) or (g) is precluded under Rule 32.2(a)(2) but not generally precluded  
 18 under Rule 32.2(a)(3). Ariz. R. Crim. P. 32.2(b).

19 As to claims of ineffective assistance of trial counsel, Arizona’s “basic rule is that  
 20 where ineffective assistance of counsel claims [were] raised, or could have been raised, [on  
 21 the first PCR], subsequently raised claims of ineffective assistance will be deemed waived  
 22 and precluded.” *State v. Spreitz*, 39 P.3d 525, 526 (Ariz. 2002) (emphasis omitted); *see*  
 23 *also Stewart v. Smith*, 46 P.3d 1067, 1071, ¶ 12 (Ariz. 2002) (“The ground of ineffective  
 24 assistance of counsel cannot be raised repeatedly.”). Indeed, in *Smith*, the Arizona Supreme  
 25 Court held that courts must find ineffectiveness of trial counsel claims raised in successive  
 26 PCRs precluded “without examining facts,” including when an ineffective-assistance-of-  
 27 trial-counsel claim on successive PCR falls within Rule 32.2(a)(3)’s personal-waiver  
 28 exception. 46 P.3d at 1071, ¶ 12.

### 1      **III.      DISCUSSION**

2            Fitzgerald argues that his *Simmons/Lynch II* claim, as well as seven of his  
3 ineffective-assistance-of-trial-counsel claims, warrant a *Rhines* stay.<sup>3</sup> (Doc. 63 at 1–19.)

#### 4            **A.      Fitzgerald’s *Simmons/Lynch II* Claim is Unexhausted**

5            Fitzgerald argues that his *Simmons/Lynch II* is now unexhausted based on *Cruz II*.  
6 Respondents assert that the *Simmons/Lynch II* claim remains exhausted despite *Cruz II*, in  
7 essence, because it is meritless. (Doc. 66 at 4–5.)

8            The Court first finds Fitzgerald’s *Simmons/Lynch II* claim is unexhausted under  
9 *Cruz II*, as he may now pursue it on a successive PCR under Rules 32.1(g) and 32.2(b)  
10 because the existence of a significant change in the law permits review on a successive  
11 PCR. *See Cruz II*, 143 S. Ct. at 658 (acknowledging that “Rule 32.1(g) allows defendants  
12 to file a successive or untimely postconviction petition if there has been ‘a significant  
13 change in the law’”); *see also, e.g., State v. Lawrence*, No. 2 CA-CR 2016-0080-PR, 2016  
14 WL 3220970, at \*2, ¶ 7 (Ariz. Ct. App. June 10, 2016) (citing Ariz. R. Crim. P. 32.1(g))  
15 (stating that “under Rule 32.2(b), a defendant may avoid preclusion by showing . . . a  
16 significant change in the law”); *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009) (“The  
17 rationale for the Rule 32.1(g) exception from waiver and preclusion is apparent: A  
18 defendant is not expected to anticipate significant future changes of the law in his of-right  
19 PCR proceeding or direct appeal.”). *See also Van Winkle*, 2023 WL 3321709, at \*4 (citing  
20 28 U.S.C. § 2254(c); *cf. Newman v. Norris*, 597 F.Supp.2d 890, 895 (W.D. Ark. 2009)  
21 (granting *Rhines* stay to exhaust in state court as a matter of comity); *Rodriguez v. Uhler*,  
22 15cv09297 (GBD) (DF), 2017 WL 9807068, at \*8 (S.D.N.Y. Oct. 23, 2017) (same).

#### 23            **B.      Fitzgerald’s *Simmons/Lynch II* Claim Lacks Potential Merit**

24            Although Fitzgerald is not precluded from filing a successive PCR in state court to  
25 exhaust Claim 14, Claim 14 lacks potential merit to support a *Rhines* stay. *See Rhines*, 544

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27            <sup>3</sup> In Claim 14, Fitzgerald also asserts that the repeated incorrect jury instructions regarding  
28 his eligibility for parole also violated his Eighth Amendment right to a reliable penalty  
phase. (Doc. 35 at 282–90.) Because Fitzgerald does not seek a *Rhines* stay to exhaust this  
subclaim, the Court does not consider it here.

1 U.S. at 277 (“[E]ven if a petitioner had good cause for that failure, th[is Court] would abuse  
2 its discretion if it were to grant [petitioner] a stay when his unexhausted claims are plainly  
3 meritless.”). Although the “potential merit” standard is not onerous, *id.*, a claim lacks  
4 potential merit if “it is perfectly clear that the [petitioner] does not raise even a colorable  
5 federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005). Thus, a claim has  
6 potential merit “unless ‘it is perfectly clear that the petitioner has no hope of prevailing.’”  
7 *See Dixon v. Baker*, 847 F.3d 714, 722 (9th Cir. 2017) (quoting *Cassett*, 406 F.3d at 624).  
8 Respondents argue that the *Simmons/Lynch II* claim lacks potential merit under *State v.*  
9 *Bush*, 423 P.3d 370 (Ariz. 2018), because Fitzgerald did not seek to have the jury informed  
10 of his parole ineligibility. (Doc. 66 at 4–6.) In that case, the Arizona Supreme Court held  
11 that *Simmons* requires only that a defendant be given the opportunity to rebut his alleged  
12 future dangerousness by informing the jury of his parole ineligibility. *Bush*, 423 P.3d at  
13 387–88. Fitzgerald asserts that even though he did not request a *Simmons* jury instruction  
14 at trial or to raise his parole eligibility to the jury, the trial court violated *Simmons* by  
15 incorrectly instructing the jury that he was parole eligible. (Doc. 62 at 9–10.) That incorrect  
16 instruction, he argues, “offends basic notions of fairness and due process.” (Doc. 63 at 9–  
17 10.)

18 “Capital sentencing proceedings must of course satisfy” due process. *Clemons v.*  
19 *Mississippi*, 494 U.S. 738, 746 (1990). Due process “expresses the requirement of  
20 ‘fundamental fairness.’” *Lassiter v. Dep’t of Soc. Servs. of Durham Cty., N.C.*, 452 U.S.  
21 18, 24 (1981). An incorrect jury instruction may deny such fairness if “‘the ailing  
22 instruction by itself so infected the entire trial [such] that the resulting conviction violates  
23 due process.’” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414  
24 U.S. 141, 147 (1973)). A capital defendant is also denied due process “when the death  
25 sentence was imposed, at least in part, on the basis of information which [he] had no  
26 opportunity to deny or explain.” *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

27 Under *Simmons*, due process entitles a capital defendant the opportunity to rebut  
28 alleged future dangerousness by having the jury informed of the defendant’s parole

ineligibility. 512 U.S. at 156-78; *see also Bush*, 423 P.3d at 386-88, ¶¶ 69-75. Thus, *Simmons* expressly flows from the opportunity to have a jury informed of the defendant’s parole ineligibility. *Simmons*, 512 U.S. at 161 (Blackmun, J., joined by Stevens, Souter, and Ginsburg, JJ.); *id.* at 175 (O’Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in judgment).

In *Bush*, the Arizona Supreme Court, parsing the *Simmons* plurality, found that Justice O’Connor’s concurrence offered the “‘narrowest ground[]’ that ‘may be viewed as [the] position taken by’ the [Supreme] Court on the issue of what due process requires in this context.’” 423 P.3d at 387 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).<sup>4</sup> Thus, the *Bush* court held that “the due process right under *Simmons* merely affords a parole-ineligible capital defendant the right to ‘rebut the State’s case’ (if future dangerousness is at issue) by informing the jury that ‘he will never be released from prison’ if sentenced to life.” *Bush*, 423 P.3d at 387 (quoting *Simmons*, 512 U.S. at 177, O’Connor, J., concurring in the judgment); *see also O’Dell v. Netherland*, 521 U.S. 151, 159 (1997) (noting that in *Simmons* “there was no opinion for the Court” and that four Justices merely “concluded that the Due Process Clause required allowing the defendant to inform the jury—through argument or instruction—of his parole ineligibility in the face of a prosecution’s future dangerousness argument”).

The Arizona Supreme Court observed that in every case in which either it or the United States Supreme Court had found reversible *Simmons* error, the trial court had “either rejected the defendant’s proposed jury instruction regarding his ineligibility for parole, prevented defense counsel ‘from saying anything to the jury about parole ineligibility’ or both.” *Id.* at 388, ¶ 74 (citing *Simmons*, 512 U.S. at 175, Ginsburg, J., concurring); *Lynch II*, 578 U.S. at 614 (both); *Kelly v. South Carolina*, 534 U.S. 246, 249 (2002) (refusal to

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<sup>4</sup> In *Marks*, the court noted, “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .” (internal quotation omitted). This is known as the “Marks rule.” *See e.g., Johnson v. City of Grants Pass*, 72 F.3d 868, 896 (9th Cir. 2023) (Collins, J. dissenting); *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139 (9th Cir. 2005) (Berzon, J., dissenting in part).

1 inform); *Shafer v. South Carolina*, 532 U.S. 36, 41–46 (2001) (citing both); *State v. Hulsey*,  
 2 408 P.3d 408, 435 (Ariz. 2018) (both); *State v. Rushing*, 404 P.3d 240, 249 (Ariz. 2017)  
 3 (refusal to inform); *State v. Escalante-Orozco*, 386 P.3d 798, 828 (Ariz. 2017) (refusal to  
 4 inform)). The Arizona Supreme Court denied Bush relief under *Simmons* because,  
 5 “[u]nlike in the aforementioned cases, the trial court neither refused to instruct, nor  
 6 prevented Bush from informing, the jury regarding his parole ineligibility.” *Id.*, ¶ 75.

7 At Fitzgerald’s trial, the court incorrectly instructed jurors that he was eligible for  
 8 parole, when he was not. It did not, however, deny Fitzgerald the opportunity to have the  
 9 jury informed of his parole ineligibility through a curative instruction, as Fitzgerald did not  
 10 request one. Nor did he ask to inform the jury himself of such ineligibility. In short,  
 11 Fitzgerald’s *Simmons/Lynch II* claim lacks potential merit because Fitzgerald did not seek  
 12 to have the jury informed of his parole ineligibility either through a curative instruction or  
 13 argument to the jury. As the Fourth Circuit noted in *Townes v. Murray*, “[T]he defendant’s  
 14 right, under *Simmons*, is one of opportunity, not of result.” 68 F.3d 840, 850 (4th Cir. 1995).  
 15 To the extent Fitzgerald claims that the trial court denied him due process, it did not deny  
 16 him due process under *Simmons*.

17 Fitzgerald cites an array of case law to support his contentions to the contrary. (Doc.  
 18 63 at 9; Doc. 67 at 5–8 and n.2.) He asserts that *Cruz II* and the remand of the six cases in  
 19 *Burns* casts doubt on the interpretation of *Simmons* above, noting that four of those  
 20 petitioners never invoked *Simmons* at trial. (Doc. 67 at 5 n.2.) But the narrow issue raised  
 21 in *Burns* was “the same question presented” in *Cruz II*—“[w]hether the Arizona Supreme  
 22 Court’s holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-  
 23 conviction relief [was] an adequate and independent state-law ground for the judgment.”  
 24 See *Burns*, Joint Petition for Writ of Certiorari, No. 21-847 (U.S. Oct. 4, 2021). Neither  
 25 *Cruz II*, nor *Burns*, held that a capital defendant’s failure to invoke *Simmons* at trial was  
 26 denied due process, where the trial court did not, sua sponte, give a *Simmons* instruction  
 27 and had inaccurately informed the jury that the defendant might be eligible for parole or  
 28 release if not sentenced to death. See *United States v. Castillo*, 69 F.4th 648, 657 (9th Cir.

2023) (“Surely, issues which are ‘neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents,” quoting *United States v. Kirilyuk*, 29 4th 1128, 1134 (9th Cir. 2022)).

Fitzgerald also cites Chief Justice Rehnquist’s dissent in *Kelly v. South Carolina*, 534 U.S. 246, 258-59 (2002), for the proposition that the majority had expanded the due process right announced in *Simmons* to instances when the prosecutor had not argued future dangerousness, but where evidence introduced to prove other elements of the case had a tendency to put the defendant’s future dangerousness at issue. (Doc. 67 at 6–8.) But in *Kelly*, the Supreme Court did not expand *Simmons*, as suggested by Fitzgerald, to impose an affirmative duty on a court to sua sponte provide a *Simmons* instruction absent a defendant’s request. Instead, counsel in *Kelly* had requested, and was denied, a *Simmons* instruction. Chief Justice Rehnquist did not state that *Kelly* imposed that affirmative duty; rather, the Chief Justice stated that *Kelly* expanded *Simmons* by applying *Simmons* even if the state only implied—but did not expressly argue—the defendant’s future dangerousness. The holding in *Kelly* did not alter the rule under *Simmons* that a defendant must invoke *Simmons* at trial or provide a basis to distinguish Fitzgerald’s case from the holdings in *Bush* and *Simmons*.

Fitzgerald also contends that *Shafer* renders his *Simmons*/*Lynch II* claim potentially meritorious. (Doc. 67 at 6–8.) In *Shafer*, the defendant requested, but was denied, a *Simmons* instruction. 532 U.S. at 41–42. The United States Supreme Court held “that whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina’s then-new scheme, due process require[d] that the jury be informed that a life sentence carrie[d] no possibility of parole.” *Id.* at 51. The Supreme Court rejected the state’s argument that *Simmons* was satisfied where, at closing argument, the defendant told the jury that if his life was spared, he would “die in prison” after “spend[ing] his natural life there.” *Id.* at 52–54. The Supreme Court explained that “[d]isplacement of [South Carolina’s] ‘longstanding practice of parole availability’ remain[ed] a [then-] relatively recent development, and ‘common sense tells us that many jurors might not know whether

1 a life sentence carries with it the possibility of parole.” *Id.* at 52 (quoting *Simmons*, 512  
2 U.S. at 177–78, O’Connor, J., concurring). “In sum, a life sentence for Shafer would permit  
3 no ‘parole, community supervision, . . . early release program, . . . or any other credits that  
4 would reduce the mandatory life imprisonment”; “this reality was not conveyed to Shafer’s  
5 jury by the court’s instructions or by the arguments defense counsel was allowed to make.”  
6 *Id.* at 54. The holding in *Shafer* did not alter the rule under *Simmons* that a defendant must  
7 invoke *Simmons* at trial.

8 Fitzgerald further cites *State v. Laney*, in which the South Carolina Supreme Court  
9 held:

10 [W]here a defendant’s future dangerousness is at issue in a  
11 capital sentencing proceeding, and the only sentencing  
12 alternative to death available to the jury is life imprisonment  
13 without parole, the trial judge *shall* charge the jury, whether  
14 requested or not, that life imprisonment means until the death  
of the defendant without the possibility of parole.

15 627 S.E.2d 726, 730 (S.C. 2006). Although the *Laney* court imposed that requirement  
16 following the decisions in *Shafer* and *Kelly*, neither of those cases altered the rule under  
17 *Simmons*, or *Gardner*, that where future dangerousness is at issue, a defendant must invoke  
18 *Simmons* in order to be afforded the opportunity to inform the jury of the defendant’s parole  
19 ineligibility. The United States Supreme Court has not imposed the requirement in *Laney*.

20 Finally, Fitzgerald cites *Bronshtein v. Horn*, in which a federal district court in  
21 Pennsylvania granted habeas relief on a *Simmons* claim even though “the petitioner did not  
22 object at trial to the trial court’s failure to instruct the jury that life means life without  
23 parole.” (Doc. 67 at 6–7, quoting No. CIV. A. 99-2186, 2001 WL 767593, at \*18–21 and  
24 n.23 (E.D. Pa. July 5, 2001), *affirmed in part, reversed in part, and remanded*, 404 F.3d  
25 700, 719 (3d Cir. 2005) (affirming *Simmons* relief)). But in *Bronshtein*, the court concluded  
26 that there was no procedural default sufficient to prevent it from considering Bronshtein’s  
27 claims on the merits; that is, no adequate clearly established state bar applied as of the time  
28 of waiver.

1 The court further found that in denying relief, the state court had not reached the  
 2 merits of his claims, *id.* at \*11, and granted relief on Bronshtein’s *Simmons* claim, *id.* at  
 3 18-19. The court did not consider Bronshtein’s apparent failure to object at trial to the trial  
 4 court’s failure to give a *Simmons* instruction because the Supreme Court of Pennsylvania  
 5 had not relied on Bronshtein’s failure to object at trial in finding his claims procedurally  
 6 defaulted. *See id.*, n.19, 23. And to the extent the habeas court considered his failure to  
 7 object at trial, this Court agrees with the *Bush* and *Townes* courts’ reading of *Simmons*: It  
 8 is the denial of a request for a *Simmons* instruction or denial of a motion to argue parole  
 9 ineligibility at trial, that denies due process, not the trial court’s failure to sua sponte give  
 10 a *Simmons* instruction.

11 In sum, *Cruz II* renders Fitzgerald’s *Simmons/Lynch II* claim unexhausted and his  
 12 petition mixed. That claim nonetheless lacks potential merit, where Fitzgerald failed to  
 13 invoke *Simmons* at trial, as discussed above. Accordingly, the Court will deny habeas relief  
 14 on that claim because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2) (allowing denial  
 15 of unexhausted claims on the merits); *see also Lambrix v. Singletary*, 520 U.S. 518, 524–  
 16 25 (1997) (explaining that the court may bypass the procedural default issue in the interest  
 17 of judicial economy when the merits are clear but the procedural default issues are not);  
 18 *Peavy v. Madden*, No.: 19cv0743-MMA (BGS), 2020 WL 4747722, at \*14 (S.D. Cal. Aug.  
 19 17, 2020) (“A claim is plainly meritless where ‘it is perfectly clear that the petitioner has  
 20 no hope of prevailing.’ That same standard applies to whether this Court can deny an  
 21 unexhausted claim on the merits.”).

### 22 **C. Ineffective-Assistance-of-Trial Counsel Claims**

23 Fitzgerald also argues that seven of his ineffective-assistance-of-trial-counsel  
 24 claims warrant a *Rhines* stay (Claims 1, 8, 9, 11, 13, 15, and 16). (Doc. 35 at 57–107, 189–  
 25 244, 251–60, 270–81, 209–338; Doc. 63 at 14 n.2.) The PCR court denied relief on Claims  
 26 1, 8, 9, 11 (R.O.A. 877 at 28–39, 52–60, 74–76, 76–92; PFR 5 at 7–9, 15, 18–19, 19–24),  
 27 and the Arizona Supreme Court denied review (R.O.A. 916 at 4–17, 24–40, 64–67, 67–77;  
 28 PFR 22). As a result, Claims 1, 8, 9, and 11 are exhausted and therefore barred from relief

1 on successive PCR under Rule 32.2(a)(2).

2 Fitzgerald did not raise Claims 13, 15, or 16 as part of his ineffective-assistance  
3 claims. (*See* R.O.A. 877; PFR 5.) Therefore, Claims 13, 15, and 16 are now technically  
4 exhausted and barred on successive PCR. *See Spreitz*, 39 P.3d at 526; *Smith*, 46 P.3d at  
5 1071, ¶ 12; *see also, e.g., Armstrong*, 2017 WL 1152820, at \*6; *Lopez v. Schriro*, No. CV-  
6 98-0072-PHX-SMM, 2008 WL 2783282, at \*9 (D. Ariz. July 15, 2008), *amended in part*,  
7 No. CV-98-0072-PHX-SMM, 2008 WL 4219079 (D. Ariz. Sept. 4, 2008), *and aff'd sub*  
8 *nom. Lopez v. Ryan*, 630 F.3d 1198 (9th Cir. 2011) (“[I]f additional ineffectiveness  
9 allegations are raised in a successive petition, the claims in the later petition necessarily  
10 will be precluded.”).

11 Relying on *Fitzgerald v. Myers*, 402 P.3d 442, 445–51 (Ariz. 2017), Fitzgerald  
12 argues that his incompetence on PCR provides an available avenue to exhaust the  
13 ineffective-assistance claims under Rule 32.1(e). (Doc. 63 at 16; Doc. 67 at 11.) *Fitzgerald*  
14 does not support this argument. *See, e.g., Morris v. Thornell*, No. CV-17-00926-PHX-  
15 DGC, 2023 WL 4237334, at \*9 (D. Ariz. June 28, 2023). In that case, the Arizona Supreme  
16 Court held that state law did not require that a defendant be competent during PCR.  
17 *Fitzgerald*, 402 P.3d at 445. The court did not address whether there was a due process  
18 right to be competent during PCR because it had not been properly raised. *Id.* at 451. The  
19 court acknowledged that, at times, “a capital defendant’s input and participation regarding  
20 a particular Rule 32 claim are needed and [are] perhaps imperative.” *Id.* at 450. But “any  
21 alleged prejudice caused by the petitioner’s incompetency may be addressed in a  
22 successive PCR petition *based on newly discovered facts* under Rule 32.1(e). *Id.* at 449  
23 (emphasis added).

24 Fitzgerald asserts that these ineffective-assistance claims are not precluded on a  
25 successive PCR under Rule 32.1(e) “based on newly discovered material facts that could  
26 not have been discovered previously due to [his] incompetence.” (Doc. 63 at 17.) But he  
27 does not allege any newly discovered material facts as to Claims 13, 15, or 16. Nor does  
28 he argue or show that his “input and participation” were necessary or imperative, to

1 discover any new facts and thereby fails to establish that he has an available remedy based  
2 on newly discovered facts.

3 Because Fitzgerald’s ineffective-assistance claims are either actually exhausted,  
4 Claims 1, 8, 9, and 11, or technically exhausted, Claims 13, 15, and 16, *Rhines* does not  
5 apply to them. See *Rhines*, 544 U.S. at 271–79 (permitting a stay of a federal habeas case,  
6 “in limited circumstances,” to allow petitioners to *exhaust unexhausted claims* in state  
7 court); *see also, e.g., McCray v. Shinn*, No. CV-17-01658-PHX-DJH, 2020 WL 919180,  
8 at \*3 (D. Ariz. Feb 26, 2020) (denying *Rhines* stay, without reaching the three-pronged  
9 *Rhines* test, because the claims are technically exhausted, as they have no available state-  
10 court remedy); *Johnson v. Ryan*, No. CV-18-00889-PHX-DWL, 2019 WL 1227179, at \*1–  
11 2 (D. Ariz. Mar. 15, 2019) (same). Thus, the Court will deny a *Rhines* stay as to them.

#### 12 **IV. MOTION TO AUTHORIZE**

13 Fitzgerald moves to authorize habeas counsel to represent him on successive state  
14 PCR under the Criminal Justice Act of 1964 (CJA), 18 U.S.C. § 3599(a)(2). (Doc. 63 at 1,  
15 19–22.) The CJA “provides for the appointment of [federal] counsel for . . . indigent[ ]”  
16 defendants in federal habeas cases, *Harbison v. Bell*, 556 U.S. 180, 184–85 (2009) (citing  
17 18 U.S.C. § 3599(a)(2)), and requires counsel to represent them:

18 throughout every subsequent stage of available judicial  
19 proceedings, including . . . all available post-conviction  
20 process, together with application for stays of execution and  
21 other appropriate motions and procedures and . . . in such  
22 competency proceedings and proceedings for executive or  
other clemency as may be available to the defendant.

23 18 U.S.C. § 3599(e). State postconviction review is not a stage “subsequent” to a federal  
24 habeas case. *See Harbison*, 556 U.S. at 189 (citing 28 U.S.C. § 2254(b)(1)) (holding as  
25 such, explaining that “[p]etitioners must exhaust their claims in state court before seeking”  
26 the writ). Thus, “a state prisoner” lacks the “statutory right” to “federally paid counsel” in  
27 seeking state postconviction relief. *Lugo v. Sec’y, Florida Dep’t of Corr.*, 750 F.3d 1198,  
28 1213 (11th Cir. 2014) (citing *Harbison*, 556 U.S. at 189); *see also, e.g., Hitcho v. Wetzel*,

No. 16-1156, 2016 WL 8717228, at \*3 (E.D. Pa. Oct. 14, 2016) (acknowledging *Lugo*).

Yet this Court may decide “on a case-by-case basis that it is appropriate for” counsel—“in the course of [their] federal habeas representation”—to exhaust claims in state court. *Harbison*, 556 U.S. at 190 n.7 (based on § 3599(e)’s provision that counsel may represent the prisoner “in ‘other appropriate motions and procedures’”); *see also, e.g., Gallegos v. Ryan*, No. CV-01-01909-PHX-NVW, 2017 WL 3822070, at \*5 (D. Ariz. July 2017) (stating, based on *Harbison*, 556 U.S. at 190 n.7, that “this Court has the discretion to appoint federal counsel to represent [federal habeas petitioner] in state court”).

In denying Fitzgerald a *Rhines* stay, such authorization is inappropriate. *See, e.g., id.* at \*2–5 (denying such authorization by denying a *Rhines* stay to exhaust a “time-barred” claim under 28 U.S.C. § 2244(d)(1) as futile); *see also Hardy v. Shinn*, No. CV-18-02494-PHX-JJT, 2021 WL 4060555, at \*7 and n.3 (D. Ariz. Sept. 7, 2021) (denying authorization for capital habeas counsel to exhaust federal habeas claims in state court based on denial of a *Rhines* stay for no good cause shown and “indications” of “dilatory litigation tactics”); *Johnson v. Ryan*, No. CV-18-00889, 2019 WL 1227179, at \*2 (D. Ariz. Mar. 15, 2019) (denying such authorization as “inappropriate and unnecessary” because petitioner was not “entitled to a *Rhines* stay,” “together with the *Harbison* Court’s discussion of [§ 3599(e)’s] parameters”).<sup>5</sup>

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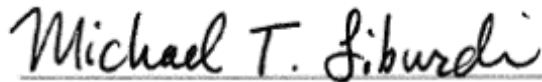
<sup>5</sup> To support this motion, Fitzgerald refers the Court to Exhibit B, Memorandum re Use of Defender Services Appropriated Funds by Federal Appointed Counsel for State Court Appearances in Capital Habeas Corpus Cases of District/Circuit Court Judge Claire V. Eagen (Dec. 9, 2010)). Judge Eagan stated that her memorandum was intended to address the issue of expending federal funds in state court *after* a habeas court has determined that a remedy is available to exhaust it in state court. *Id.* at 2. That is not the case here.

1 Accordingly,

2 **IT IS ORDERED denying** Claim 14 to the extent that it asserts a violation of  
3 *Simmons and Lynch II*.

4 **IT IS FURTHER ORDERED denying** Fitzgerald's Motion for Temporary Stay  
5 and Abeyance and for Authorization to Represent Petitioner in State Court (Doc. 63).

6 Dated this 1st day of September, 2023.

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10 Michael T. Liburdi  
11 United States District Judge  
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